Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-Certification of IP-Originated VoIP Traffic	)	WC Docket No. 05-283
	)	

<u>COMMENTS OF EARTHLINK, INC.</u>

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EarthLink, Inc., by its attorneys and pursuant to the Commission's Public Notice,[1] files these comments on the above-captioned Grande Petition[2] concerning the treatment under the Commission's existing access charge regulations of traffic terminated through Grande to end users of interconnected local exchange carriers ("ILECs") in circumstances where customers of Grande have certified that the traffic originated in Internet protocol ("IP") format. EarthLink is among the largest independent broadband Internet Service Providers ("ISPs") in the United States today. EarthLink provides Internet services to over 5 million customers, including high-speed Internet access, Voice over Internet Protocol ("VoIP"), and other IP-enabled services. As such, EarthLink has an interest in this declaratory ruling proceeding.

INTRODUCTION AND SUMMARY

EarthLink fully supports the Grande Petition. This proceeding is significant because it addresses the application of today's existing access charge regulations to IP voice

[1] FCC Public Notice, DA 05-2680 (rel. Sept. 26, 2005).

[2] Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-Certification of IP-Originated VoIP Traffic (filed Oct. 3, 2005) ("Grande Petition").

communications, a vitally important matter that would settle ongoing confusion in the industry. The issues raised by Grande are of critical importance to VoIP providers, competitive LECs, and ILECs. Indeed, regulatory clarification of the procedures for exchange of traffic between IP-enabled and traditional POTS networks is sorely needed, and would greatly enhance the ability of all industry participants to invest in and build out IP-enabled networks and deploy IP-enabled services by providing all parties with certainty of the cost-structures in the provision of IP-enabled services. Further, such clarification would allow all industry participants – incumbents and new providers – to avoid needless wrangling and expenditures associated with settling access charge disputes.

The Federal Communications Commission ("Commission" or "FCC") has already sought comment on proposals to change the existing access charge regime,[3] as well as on the question of whether VoIP providers should pay intercarrier compensation or access charges prospectively through a change of FCC rules and regulations.[4] Therefore, this proceeding is not the appropriate place for yet another comprehensive rulemaking and policy record on reform of or rule changes to the existing access charge system. Matters regarding changes to the access charge system are not raised in the Grande Petition, and should be addressed by the Commission separately in the pending rulemaking proceedings.

Instead, in this proceeding, the Commission would well-serve the entire IP and telecommunications industry by affirming that Grande's IP service is not subject to ILEC per-minute access charges under current FCC law and by clarifying that self-certification is an

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[3] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005)

[4] *In the Matter of IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

acceptable method of to confirm the status of such traffic with terminating ILECs. As discussed below, the IP traffic described in the Grande Petition is clearly "information service" traffic and, under current FCC law, ILECs are not permitted to assess per-minute access charges for the termination of such traffic. Grande proposes a practical and reasonable approach of self-certification to ensure that such information service traffic is identified, that will likely prevent or diminish the ILECs from exercising unreasonable "self-help" such as threatening access charge litigation or blocking IP traffic. The Commission should clarify that the ILECs violate their obligations under Sections 201 and 202 of the Communications Act when they refuse to accept self-certification from IP providers and/or otherwise engage in "self-help" measures against IP providers that impede interconnectivity between networks and the deployment of advanced services.

DISCUSSION

I. The Grande IP Traffic is Interstate Information Service Traffic

EarthLink agrees that the IP-enabled service described in the Grande Petition is an "information service" as defined by the Communications Act and relevant FCC precedent. As the Grande Petition explains, VoIP service providers offer VoIP service to end users and also contract with Grande for VoIP call termination ("Grande Customer VoIP Service"). Grande is a local exchange carrier and its VoIP customers hand off VoIP traffic to Grande that originates at the calling party's location in TCP/IP protocol and is then terminated at the called party's location on the PSTN in TDM protocol. Where the called party is also a Grande voice local exchange customer, Grande performs the call termination in TDM format. Where the called party is an ILEC voice customer, Grande passes the VoIP traffic to the ILEC, via local interconnection trunks and pursuant to a Grande-ILEC interconnection agreement, for ILEC termination of the call in TDM format. Where the ILEC terminates the call, Grande pays the ILEC reciprocal compensation for performing such termination. Thus, the Grande Customer VoIP Service provides subscribers with an "end-to-end" net protocol conversion service (i.e., TCP/IP-to-TDM) every time the VoIP subscriber calls a PSTN end user.

The protocol of the VoIP subscriber's voice communications is transformed and processed between the calling party and the called party and thus, consistent with longstanding FCC precedent, the Grande Customer VoIP Service is an "information service" under Section 3(20) of the Communications Act.[5] In *Computer II*, the FCC first held that net protocol conversion is an enhanced service.[6] On reconsideration of *Computer II*, the Commission rejected arguments that protocol conversion should be deemed a basic service. The FCC did clarify, however, that "protocol conversion capabilities a carrier may employ internal to its own network" are not enhanced services under *Computer II*.[7] Specifically, in what has become known as the "internetworking exception" to the protocol conversion precedent, the FCC explained:

> In a basic service, while various conversions may take place within the network, the result of the common carrier offering is not a change in protocol. For example, if the information enters a carrier's network on protocol 'A,' it must exit the network on the same protocol, even though within the network it could be converted to 'x,' 'y,' or 'z' protocols for network traffic management or security purposes.[8]

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5 47 U.S.C. § 153(20).

6 *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C. 2d 384, ¶ 99 (1980) ("*Computer II*"), *aff'd*, CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

7 Memorandum Opinion and Order, 84 F.C.C. 2d 50, ¶ 26 (1980).

8 Id.

Thus, it follows that when a "net" protocol conversion occurs – i.e., the transmission protocols are different entering and exiting from the caller's location to the called party's location – an "enhanced service" is provided.

More recently, the FCC has affirmed that a net protocol conversion is an "information service" under the Telecommunications Act of 1996, holding that "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services,'" and "both protocol conversion and protocol processing services are information services under the 1996 Act."[9] In 1997, the Commission reaffirmed this holding.[10]

In 2003, the U.S. district court in *Vonage v. Minnesota PUC* held that that the Vonage VoIP service was an "information service" because

> [t]he process of transmitting customer calls over the Internet requires Vonage to 'act on' the format and protocol of the information. 47 C.F.R. § 64.702(a). For calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the format of the PSTN before a POTS user can receive the call. For calls originating from a POTS user, the process of acting on the format and protocol is reversed. The Court concludes that Vonage's activities fit within the definition of information services.[11]

Thus, even where a voice service is involved and the service is "primarily" to transport voice from one caller to another, net protocol conversion renders it an "information service."

In the 2004 *AT&T IP in the Middle Order*, the Commission found that AT&T's IP service did not offer an end-to-end "net protocol conversion" due to the fact that the information

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[9] *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶¶ 102, 104 (1996).

[10] *In the Matter of Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd. 8776, ¶ 789 (1997), *aff'd sub nom.*, Allenco Communications, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000).

[11] Vonage v. Minnesota PUC, 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff'd*, 394 F.2d 568 (8th Cir. 2004).

sent and received by end-users was identical traffic, and the only protocol conversions were "internetworking" conversions taking place entirely within AT&T's network.[12] In fact, the end user traffic in that case originated in the ILEC protocol (e.g., TDM), went through the ILEC's circuit switches and, ultimately, terminated in the ILEC protocol (e.g., TDM) at the called party premises. Thus, in that case, the Commission ruled that the "internetworking exception" applied and the AT&T service was not an "information service."

Accordingly, the FCC's treatment of net protocol conversion in the *AT&T IP in the Middle Order* supports that the finding that Grande Customer VoIP Service is an "information service." In contrast to the AT&T service, the Grande Customer VoIP Service performs a protocol change of the calling and called parties' voice signal between the Internet protocol (TCP/IP) and the ILEC protocol (TDM), just as the U.S. District Court found a net protocol conversion (IP-to-TDM) in the *Vonage* case. Moreover, the FCC expressly limited its holding in the *AT&T IP in the Middle Order* to an offering that "originates and terminates on the public switched telephone network (PSTN)" and "provide[s] no enhanced functionality to end users due to the IP technology."[13] At a minimum, the Grande Customer VoIP Service does not originate traffic on the PSTN and so the holding of the *AT&T IP in the Middle Order* would not apply.

II. ILEC Per-Minute Access Charges Do Not Apply to Grande's IP Service

As an interstate information service, the FCC's rules and precedent provide that the termination of Grande Customer VoIP Service traffic is not subject to per-minute interstate ILEC access charges. Under Part 69 of the FCC's rules, "end users" are charged a set of distinct

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[12] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, ¶12 (2004) ("*AT&T IP in the Middle Order*").

[13] *AT&T's IP in the Middle Order*, ¶ 1.

charges that do not include per-minute "carrier's carrier" charges assessed on interexchange carriers for the termination of traffic.[14] Consistent with FCC precedent, information service providers have always been deemed to be "end users" under this system of charges.[15] Further, the FCC has repeatedly explained that the "end user" status of ISPs applies vis-à-vis "originating and terminating" ILEC access charges.[16] Moreover, no FCC rule or precedent distinguishes between ISP traffic that is originating or terminating on the PSTN, and no rule applies terminating or originating per-minute access charges in one case but not the other. To read into the rules such a distinction would violate the current framework of the FCC's Part 69 rules, and

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[14] 47 C.F.R. § 69.5 (defining charges that apply to "end users" as distinct from those that apply to "interexchange carriers"); § 69.154 (method of calculating per-minute access charges for price cap LECs to assess on interexchange carriers).

[15] *In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, ¶ 83 (1983) ("Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.); *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, ¶ 20 n. 53 (1988) ("Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges."); *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 344 (1997) ("We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs.") *aff'd sub nom.*, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998).

[16] *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 341 (1997) ("In the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities *to originate and terminate interstate calls*, ISPs should not be required to pay interstate access charges") (emphasis added).

such a change could be accomplished only through a prospective FCC rulemaking on the matter.[17] Thus, current FCC law provides that interstate per-minute access changes of the incumbent LECs do not apply to information service provider terminating traffic.

Moreover, the FCC's *AT&T IP in the Middle Order* confirms this is the current law. The issue decided in that case was whether AT&T owed *terminating* access to the ILECs, since AT&T was already paying ILEC originating access charges for the calls. The FCC approached the issue by first determining whether the AT&T service was a "telecommunications service" or an "information service," and only when the FCC made the "telecommunications service" finding did it hold that AT&T owed terminating access charges under the FCC's Part 69 rules. Thus, in that case, the FCC's determination of a "telecommunications service" was a necessary predicate for the application of Part 69 terminating interstate ILEC access charges.[18]

The *AT&T IP in the Middle Order* (¶ 19) also responded to the issue of applying access charges to other "like services," and held that only similar "telecommunications services" would be subject to terminating interstate access charges:

> We note that all *telecommunications services* are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the *interexchange carrier* is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. (emphasis added)

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[17] *See, e.g., In the Matter of Developing a Unified Intercarrier Compensation Regime,* Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005); *In the Matter of IP-Enabled Services,* First Report and Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

[18] *See also,* In re: Transcom Enhanced Services, LLC, 2005 (Bankr. LEXIS 1244) (N.Tx. April 25, 2005) (Debtor, an IP-based long distance provider, did not owe incumbent LEC access charges because it was an "information service" provider and not a "telecommunications service" provider).

Finally, the Grande Customer VoIP Service is also not subject to ILEC intrastate access charges because, under the *FCC Vonage Order*,[19] such VoIP services are interstate services. The Grande Customer VoIP Service, like the Vonage VoIP Service, "cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. . . [T]his Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."[20] The FCC concluded that the characteristics of DigitalVoice "preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme."[21] As the Commission explained in the *FCC Vonage Order* (¶ 1), "to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent."

III. The Self-Certification Proposed by Grande Is Reasonable and Efficient

EarthLink supports Grande's proposal for certification of appropriate IP-enabled traffic as "information service" traffic. Without such a process, it is likely that incumbent LECs will engage in "self-help" and either block IP-enabled traffic entirely or force IP providers to pay access charges in order to avoid the disruption and possible loss of interconnectivity, despite the fact that such practices are clearly in violation of law. The FCC should act swiftly and clearly to

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[19] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004) ("*FCC Vonage Order*").

[20] *FCC Vonage Order*, ¶ 1.

[21] *FCC Vonage Order*, ¶¶ 14, 32.

prohibit such ILEC self-help measures, which not only drive up the cost and reduce affordability of IP services, but also have a general deterrent effect on IP deployment and development of new IP services, due to the uncertainty of whether providers will be forced to pay excessive rates for access to the PSTN.

Self-certification is also a widely-used and accepted practice in the telecommunications industry. For example, when the BOCs voluntarily introduced wholesale xDSL services in the late 1990's, the BOCs adopted a practice of requiring ISPs and other customers to certify that the DSL traffic would be at least 10% or more interstate in nature, in order to ensure appropriate treatment as an interstate service for jurisdictional purposes. The FCC affirmed that self-certification as proposed by the BOCs was, indeed, an appropriate practice.[22] The FCC also has relied on end user self-certification for the past 16 years to determine the proper jurisdiction of special access services because it "fosters administrative simplicity and economic efficiency."[23] Thus, there would appear to be every reason for the FCC to affirm the use of self-certification as proposed in the Grande Petition.

To the extent that ILECs may complain that self-certification would lead to a high-degree of abuse by providers that are obligated to pay per-minute access charges, such claims are weak. To the extent that ILECs believe a given service provider is offering a telecommunications service and evading per-minute access charges for terminating traffic, the self-certification process would not impede the ILEC from exercising its rights in full with respect to such a

[22] *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 27 & n. 95 (1998) ("We emphasize that we believe federal tariffing of ADSL service is appropriate where the service will carry more than a de minimis amount of inseparable interstate traffic," and noting that "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate.").

[23] *In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660, ¶ 6 (1989).

provider. Indeed, because self-certification requires a responsible party to state affirmatively the nature of the traffic, self-certification will likely contribute to overall deterrence of abusive practices.

CONCLUSION

For the foregoing reasons, EarthLink urges the Commission to act expeditiously on the Grande Petition and to clarify that, under existing law and consistent with the ILECs' obligations to act in a reasonable and just manner, IP-enabled information service providers may follow a process of self-certification to avoid per-minute ILEC access charge claims when terminating traffic on the PSTN.

Respectfully submitted,

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December 12, 2005

CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that copies of the foregoing *Comments of EarthLink, Inc.*, were submitted electronically or by regular mail, this day, Monday, December 12, 2005, to the following:

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